

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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FRANK MERCADO, individually and as administrator of  
the Estate of DAVID MERCADO, and EVELYN  
MERCADO,

Plaintiff,

- against -

08 CV 2855

**ANSWER**

THE CITY OF NEW YORK, DEPARTMENT OF  
CORRECTION COMMISSIONER MARTIN F. HORN,  
JOHN DOE CORRECTION OFFICERS ##1-5, PRISON  
HEALTH SERVICES, INC., MICHAEL CATALANO,  
C.E.O. OF PRISON HEALTH SERVICES, INC.,  
DEPARTMENT OF HEALTH AND MENTAL  
HYGIENE MEDICAL DIRECTOR TREVOR PARKS,  
DEPARTMENT OF HEALTH AND MENTAL  
HYGIENE PROGRAM DIRECTOR REBECCA PINNEY,  
DEPARTMENT OF HEALTH AND MENTAL  
HYGIENE DEPUTY COMMISSIONER JAMES  
CAPOZIELLO, DEPARTMENT OF HEALTH AND  
MENTAL HYGIENE MEDICAL DIRECTOR DOCTOR  
BENJAMIN OKONTA, PRISON HEALTH SERVICES,  
INC., EMPLOYEES ##1-5

Defendants.

**TRIAL BY JURY  
DEMANDED**

-----X  
Defendant MARTIN F. HORN, by his attorneys, HEIDELL, PITTONI,  
MURPHY & BACH, LLP, Of Counsel to MICHAEL A. CARDOZO, ESQ., Corporation  
Counsel of the City of New York, upon information and belief, answers the complaint herein as  
follows:

**AS AND TO THE SECTION DESIGNATED PRELIMINARY STATEMENT**

FIRST: Denies the allegations contained in the paragraphs of the complaint  
designated "1" through "3" insofar as the allegations pertain to the answering defendant and  
otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and  
begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECTION DESIGNATED JURISDICTION**

SECOND: Denies the allegations contained in the paragraphs of the complaint designated "4" through "6" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECTION DESIGNATED PARTIES**

THIRD: Denies the allegations contained in the paragraphs of the complaint designated "7" through "17" insofar as the allegations pertain to the answering defendant except admits that at certain times not specifically set forth in the complaint defendant MARTIN F. HORN was and is commissioner of the Department of Corrections and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECTION DESIGNATED NOTICE OF CLAIM**

FOURTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "18" and otherwise begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECTION DESIGNATED CERTIFICATE OF MERIT**

FIFTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "19" and otherwise begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECTION DESIGNATED JOINT LIABILITY**

SIXTH: Denies the allegations contained in the paragraphs of the complaint designated "20".

**AS AND TO THE SECTION DESIGNATED FACTUAL ALLEGATIONS**

SEVENTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "21" and otherwise begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

EIGHTH: Denies the allegations contained in the paragraphs of the complaint designated " 22."

NINTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "23," and otherwise begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

TENTH: Denies the allegations contained in the paragraphs of the complaint designated "24" through "26" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE FIRST CAUSE OF ACTION**

ELEVENTH: Answering the paragraph of the complaint designated "27," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "26" with the same force and effect as if herein set forth at length.

TWELFTH: Denies the allegations contained in the paragraphs of the complaint designated " 28" and "29" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SECOND CAUSE OF ACTION**

THIRTEENTH: Answering the paragraph of the complaint designated "30," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "29" with the same force and effect as if herein set forth at length.

FOURTEENTH: Denies the allegations contained in the paragraphs of the complaint designated "31" through "41" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE THIRD CAUSE OF ACTION**

FIFTEENTH: Answering the paragraph of the complaint designated "42," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "41" with the same force and effect as if herein set forth at length.

SIXTEENTH: Denies the allegations contained in the paragraphs of the complaint designated "43" through "49" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE FOURTH CAUSE OF ACTION**

SEVENTEENTH: Answering the paragraph of the complaint designated "50," defendant repeats and realleges each and every denial and admission in answer to the paragraphs

of the complaint designated "1" through "49" with the same force and effect as if herein set forth at length.

EIGHTEENTH: Denies the allegations contained in the paragraphs of the complaint designated " 51" and "52" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE FIFTH CAUSE OF ACTION**

NINETEENTH: Answering the paragraph of the complaint designated "53," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "52" with the same force and effect as if herein set forth at length.

TWENTIETH: Denies the allegations contained in the paragraphs of the complaint designated "54" through "56" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE SIXTH CAUSE OF ACTION**

TWENTY-FIRST: Answering the paragraph of the complaint designated "57," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "56" with the same force and effect as if herein set forth at length.

TWENTY-SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "58" through "60".

**AS AND TO THE SEVENTH CAUSE OF ACTION**

TWENTY-THIRD: Answering the paragraph of the complaint designated "61," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "60" with the same force and effect as if herein set forth at length.

TWENTY-FOURTH: Denies the allegations contained in the paragraphs of the complaint designated "62" through "65".

**AS AND TO THE EIGHTH CAUSE OF ACTION**

TWENTY-FIFTH: Answering the paragraph of the complaint designated "66," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "65" with the same force and effect as if herein set forth at length.

TWENTY-SIXTH: Denies the allegations contained in the paragraphs of the complaint designated "67" through "70."

**AS AND TO THE NINTH CAUSE OF ACTION**

TWENTY-SEVENTH: Answering the paragraph of the complaint designated "71," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "70" with the same force and effect as if herein set forth at length.

TWENTY-EIGHTH: Denies the allegations contained in the paragraphs of the complaint designated "72" and "73" insofar as the allegations pertain to the answering defendant

and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE TENTH CAUSE OF ACTION**

TWENTY-NINTH: Answering the paragraph of the complaint designated "74," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "73" with the same force and effect as if herein set forth at length.

THIRTIETH: Denies the allegations contained in the paragraphs of the complaint designated "75" and "76" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**AS AND TO THE ELEVENTH CAUSE OF ACTION**

THIRTY-FIRST: Answering the paragraph of the complaint designated "76," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "75" with the same force and effect as if herein set forth at length.

THIRTY-SECOND: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraphs of the complaint designated "77" and "78".

**AS AND TO THE TWELFTH CAUSE OF ACTION**

THIRTY-THIRD: Answering the paragraph of the complaint designated "79," defendant repeats and realleges each and every denial and admission in answer to the paragraphs of the complaint designated "1" through "78" with the same force and effect as if herein set forth at length.

THIRTY-FOURTH: Denies the allegations contained in the paragraphs of the complaint designated "80" through "83" insofar as the allegations pertain to the answering defendant and otherwise denies knowledge or information sufficient to form a belief as to these paragraphs and begs leave to refer all questions of law to the court and all questions of fact to the trier thereof.

**FOR A FIRST DEFENSE**

THIRTY-FIFTH: That whatever damages may have been sustained at the time and place alleged in the complaint by plaintiffs, plaintiff's decedent and/or decedent's distributees were caused, in whole or in part, by the culpable conduct of plaintiff, plaintiff's decedent and/or decedent's distributees and without any negligence on the part of defendant. Damages, if any, are to be diminished proportionally to the culpable conduct of the plaintiffs, plaintiff's decedent and/or decedent's distributees.

**FOR A SECOND DEFENSE**

THIRTY-SIXTH: That the equitable share of liability, if any, of defendant MARTIN F. HORN, shall be determined pursuant to the provisions of Article 16 of the CPLR.

**FOR A THIRD DEFENSE**

THIRTY-SEVENTH: That one or more of the causes of action in the complaint fail to state a cause of action upon which relief may be granted.

**FOR A FOURTH DEFENSE**

THIRTY-EIGHTH: Plaintiffs are not proper party plaintiffs and this action is therefore a nullity.



**FOR A FIFTH DEFENSE**

THIRTY-NINTH: This action is barred or defendant is entitled to a set-off against any award herein as plaintiffs have previously recovered sums for all or part of the damages claimed herein.

**FOR A SIXTH DEFENSE**

FORTIETH: The amount of alleged damages claimed by plaintiffs should be reduced pursuant to CPLR § 4545 to the extent of any collateral source benefits, remuneration or compensation received.

**FOR A SEVENTH DEFENSE**

FORTY-FIRST: That defendant denies that it is liable in any way to plaintiffs under any legal theory because of the doctrine of immunity, whether qualified, sovereign, statutory or otherwise.

**FOR A EIGHTH DEFENSE**

FORTY-SECOND: That plaintiffs is not entitled to recover damages in this action under 42 U.S.C. § 1983.

**FOR A NINTH DEFENSE**

FORTY-THIRD: That the occurrence alleged in plaintiffs' complaint was caused, contributed to and brought about, in whole or in part, by the conduct of persons over whom this defendant exercised no supervision or control, including the plaintiffs, such conduct amounting to contributory negligence, and the damages and injuries otherwise recoverable by plaintiffs, if any, should be diminished in proportion to which such persons' conduct bears to the conduct which caused decedent's injuries and damages, if any, pursuant to the decisional and statutory laws of the State of New York and the United States in such cases made and provided.

**FOR A TENTH DEFENSE**

FORTY-FOURTH: That this defendant alleges and states that plaintiffs' claim for relief is barred, because plaintiffs and plaintiffs' representatives assumed the risk and were fully cognizant of any and all circumstances surrounding the events that gave rise to this action.

**FOR A ELEVENTH DEFENSE**

FORTY-FIFTH: That this defendant alleges and states that there were intervening and superseding acts and occurrences over which it had no control and which caused any claimed injuries of plaintiff's decedent, DAVID MERCADO.

**FOR A TWELFTH DEFENSE**

FORTY-SIXTH: That this defendant denies any and all allegations of plaintiffs' complaint not specifically admitted herein.

**FOR A THIRTEENTH DEFENSE**


FORTY-SEVENTH: That this defendant reserves the right to amend its answers and/or affirmative defenses that may be determined applicable in the future by discovery in this matter.

WHEREFORE, defendant MARTIN F. HORN, demands judgment dismissing the complaint herein, together with the costs and disbursements of this action.

Respectfully submitted,

HEIDELL, PITTONI, MURPHY & BACH, LLP  
Of Counsel to MICHAEL A. CARDOZO, ESQ.,  
Corporation Counsel of the City of New York

By:

  
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PAUL S. HABERMAN (PSH 2771)  
Attorneys for Defendant

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